

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

FILED  
04 JAN 23 PM 4:11  
U.S. DISTRICT COURT  
N. DIST. OF ALABAMA

Alabama Environmental Council,

Plaintiff,

vs.

The United States Environmental  
Protection Agency,

Defendant.

No. \_\_\_\_\_

COMPLAINT

CV-04-B-0141-S

## I. INTRODUCTION

1. This case challenges the United States Environmental Protection Agency's ("EPA") ongoing violation of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, by refusing to provide responsive records relating to a proposed modification to the federally enforceable state implementation plan for the State of North Carolina ("NC SIP") and by failing to respond in a timely fashion to plaintiff's administrative appeal of EPA's determination regarding certain privileges.

2. The requested documents involving the proposed North Carolina SIP revision reflect important national developments concerning federal air pollution requirements of the Clean Air Act and are relevant to an anticipated proposal by the State of Alabama to modify the current Alabama state implementation plan ("Alabama SIP") which is expected to be similar to the North Carolina proposal. Such a proposal, if approved by EPA, would adversely affect the interests of the AEC and its membership, and will be legally challenged by AEC because of its

patent inconsistency with the Clean Air Act.

3. In response to AEC's request for documents pursuant to FOIA on August 11, 2003, EPA refused to produce approximately 604 pages of responsive records related to the North Carolina proposal to revise the NC SIP, relying on the assertion that the attorney client and deliberative process privilege exempts these documents from disclosure in their entirety. However, EPA has failed to substantiate these claims or to provide any documentation comparable to a Vaughn index. Indeed, many, if not all, of these privilege claims appear to be facially unsupportable and overly broad. Moreover, EPA entirely failed to respond to AEC's appeal filed on November 6, 2003 which was required by FOIA within twenty (20) days.

4. By violating the requirements of FOIA and failing to respond to AEC's appeal with the required time frames, EPA is preventing AEC from having access to critical documents, thereby impairing AEC's ability to effectively evaluate and, if necessary, challenge proposed regulatory changes in Alabama and elsewhere related to air quality. If EPA's ongoing FOIA violations are not promptly enjoined, AEC and its membership will suffer profound adverse consequences by being precluded from participating in significant regulatory actions involving the Clean Air Act and the Alabama SIP in a meaningful way because of a lack of critical, non-privileged information.

## **II. JURISDICTION AND VENUE**

5. JURISDICTION: This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

6. VENUE: Venue lies in the Northern District of Alabama pursuant to

28 U.S.C. § 552(a)(4)(B) because the action arises in the Northern District of California and because the principal place of business of plaintiff is in this district.

## II. PARTIES

7. Plaintiff AEC, formerly the Alabama Conservancy, is Alabama's oldest, citizen-based, 501(c)(3), nonprofit, educational and advocacy organization dedicated to the preservation and protection of Alabama's natural environment and health. Founded in 1967, the AEC has continually addressed environmental issues such as water pollution, land preservation, air quality, energy consumption, solid waste and environmental education for its members and citizens. The AEC has a membership base of over 1,000 and four volunteer-based chapters. The AEC's office is located at 2717 7th Avenue South, Suite 207, Birmingham, Alabama 35233.

8. As noted in AEC's By-Laws, the AEC's purposes are, *inter alia*, to:

[P]reserve in the public interest or aid in the preservation of areas in the State of Alabama which are of scenic, ecological, biological, historical, or recreational importance; to establish or aid in the establishment of nature reserves or other protected areas for scientific, educational, or aesthetic purposes; to conduct, as needed, land use planning studies as a basis for land acquisition and other purposes; and to promote programs in conservation education, to the end that the Council shall serve the people in Alabama as an agency for general enlightenment, for cultural improvement, and for scientific advancement.

9. In addition to its involvement in a diverse range of other environmental issues, AEC works on behalf of its members to protect and enhance the quality of air throughout Alabama. In furtherance of its goal to preserve areas of scenic, ecological, biological, historical, or recreational importance, AEC has filed and is prosecuting a number of federal environmental lawsuits seeking to enforce the current Clean Air Act and/or Alabama SIP regulations in Alabama. It

also distributes information to its membership and the general public concerning the Clean Air Act and air quality issues through its web site.

10. Defendant EPA is an executive branch agency and has possession or control of the records Plaintiff seeks in this action.

## **STATUTORY FRAMEWORK AND FACTS GIVING RISE TO CAUSES OF ACTION**

### **THE FREEDOM OF INFORMATION ACT**

11. FOIA, 5 U.S.C. § 552, *as amended*, requires agencies of the federal government to release, upon request, information to the public, unless one of nine specific statutory exemptions applies.

12. Upon receiving a FOIA request, an agency has twenty working days to respond. 5 U.S.C. § 552(a)(6)(A). Although the agency may grant itself an extension of ten additional days in “unusual circumstances,” FOIA does not permit an agency to delay a response indefinitely. 5 U.S.C. § 552(a)(6)(B).

13. FOIA requires an agency to make a determination with respect to an appeal within twenty working days. 5 U.S.C. § 552(a)(6)(A).

14. FOIA expressly provides that a requester “shall be deemed to have exhausted his administrative remedies . . . if the agency fails to comply with the applicable time limit provisions.” 5 U.S.C. § 552(a)(6)(C).

### **FACTUAL BACKGROUND**

15. Because information and data relating to North Carolina's proposed revision of the NC SIP was relevant to national Clean Air Act regulatory policy and the anticipated effort on Alabama's part to propose a similar revision to the Alabama SIP to EPA – issues AEC's membership and staff care about deeply –

AEC's sought to obtain all the communications and data related to this proposal by submitting a FOIA request to EPA.

16. On August 11, 2003, AEC submitted a FOIA request to EPA which sought the following information:

All documents related in any manner to the recently proposed revision to the North Carolina State Implementation Plan ("SIP") and North Carolina's Rule NCAC 2D.0521 governing opacity addressed at 68 Fed. Reg. 33873 (June 6, 2003), including, without limitation, any correspondence or e-mails among or between affected members of industry or trade groups/associations, state officials, EPA officials and/or citizens; all internal notes, memoranda, e-mail or correspondence prepared by or received by EPA personnel; and all computerized air models, computerized air modeling results/runs or other information and data relating to North Carolina's anticipated level of compliance with NAAQS standards.

17. By letter dated September 12, 2003, EPA provided AEC with an interim response to the FOIA request that enclosed five (5) documents consisting of twenty-four (24) pages. It also confirmed its agreement with counsel for AEC to provide a final response by September 30, 2003.

18. By letter dated October 10, 2003, ten (10) days after EPA had agreed to submit a final response to AEC, EPA provided AEC with a final response to the FOIA request. EPA's final response asserted that the attorney-client and deliberative process privileges exempted the remaining six hundred and four (604) pages of responsive EPA documents from disclosure.

19. EPA's October 10, 2003 final response contained an index of the documents being withheld, but it provided only the most cursory and vague descriptive information. Specifically, it stated as follows:

1. Multiple E-mails to multiple Addressees from March 11, 2002 to September 29, 2003, RE: recently proposed revision to the North Carolina State Implementation Plan (SIP) and North Carolina's Rule NCAC 2D.0521 governing opacity addressed

at 68 Fed. Reg. 33873 (June 6, 2003) - **Deliberative Process Privilege and Attorney Client Privilege** and - 5 U.S.C. § 552(b)(5) - **Approximately 600 pages**

2. Internal memorandum dated April 17, 2001, from R. Douglas Neeley, Chief, Air & Radiation Technology Branch, to Kay Prince, Chief, Air Planning Branch regarding Comments on Forsyth County's Proposed Rule Revisions; Submittal dated March 19, 2001 - **Deliberative Process Privilege** - 5 U.S.C. §§ 552(b)(5) - **4 pages**

(emphasis in original).

20. The index of two items provided by EPA does not adequately enumerate or identify the responsive documents, explain how the claimed exemptions apply to specific individual documents, or enable plaintiff to determine whether any exemption claims have been waived.

21. On November 6, 2003, AEC filed a FOIA appeal with EPA challenging the EPA's failure to provide all the records requested by AEC within FOIA's required timeframes and challenged EPA's assertion of the attorney-client and deliberative process privileges.

22. To date, EPA has failed to respond in any manner to AEC's appeal. Since EPA more than twenty (20) days have passed since AEC's appeal was submitted to EPA and EPA has exceeded other FOIA deadlines, AEC is deemed to have exhausted all its administrative remedies.

### **PLAINTIFF'S CAUSES OF ACTION**

#### **(Claim One: Failure to Produce All Responsive, Non-privileged Records)**

23. By failing to provide all responsive, non-responsive records to Plaintiff's August 11, 2003 FOIA request, EPA has violated FOIA's mandate to release agency records to the public. 5 U.S.C. § 552(a)(6).

24. Plaintiff has a right to obtain the requested records immediately at no cost.

**(Claim Two: Failure to Comply with FOIA's Time Limitations)**

25. By failing to provide a final response to Plaintiff's August 11, 2003 FOIA request within FOIA's twenty (20) day time limitation and/or the parties' agreed extension of time and by failing to respond to AEC's appeal within twenty (20) days as required by FOIA, EPA has violated FOIA's time limitations. 5 U.S.C. § 552(a)(6)(A) and (B).

26. Plaintiff has a right to obtain the requested records immediately at no cost.

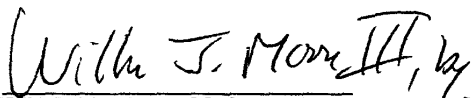
**RELIEF REQUESTED**

WHEREFORE, the plaintiff respectfully requests the Court:


- A. DECLARE that Defendant has violated FOIA by failing to produce to Plaintiff all responsive, non-privileged records in response to Plaintiff's August 11, 2003 FOIA request;
- B. DECLARE that Defendant has violated FOIA by failing to respond in a timely manner to Plaintiff's FOIA request and appeal;
- C. ORDER Defendant to make all the requested records available to Plaintiff within twenty (20) days;
- D. AWARD Plaintiff its costs and reasonable attorneys' fees in this action; and
- E. GRANT such other and further relief as the Court may deem just and proper.


DATED this \_\_\_<sup>th</sup> day of January 2004.

ALABAMA ENVIRONMENTAL COUNCIL, INC., Plaintiff

  
WILLIAM J. MOORE, III  
Florida Bar No. 0971812  
HENRICHSEN SIEGEL MOORE  
1648 Osceola Street  
Jacksonville, Florida 32204  
(904) 381-8183  
(904) 381-8191 Facsimile  
(Pro hac motion to be filed)

*permiss*  
*BBS*  
*1/23/04*

  
BYRON BART SLAWSON  
ASB - 9234-N71B  
Attorney at Law  
The 1776 Building  
1776 Independence Court, Suite 204  
Birmingham, AL 35216  
(205) 870-1997  
(205) 868-6928 Facsimile

  
GEORGE E. HAYS  
California State Bar No. 119904  
Attorney at Law  
236 West Portal Avenue, #110  
San Francisco, CA 94127  
(415) 566-5414  
(415) 731-1609 Facsimile  
(Pro hac motion to be filed)

*permiss*  
*BBS*  
*1/23/04*